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No._____

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In The

Supreme Court of the United States

October Term, 1983

M. P. DORAN, JAMES A. SCOTT
and JAMES H. BAILEY,

Petitioners,

vs.

F. H. HOULE and JAMES W. GLOSSER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Question I.

Can the government, exercising unbridled discretion, destroy an established business without due process?

Question II.

Can the government on the one hand impose regulations on an established business and then with the other destroy it through the regulation without affording due process?

PARTIES TO THIS LITIGATION

Pursuant to Rule 21.1(b), Rules of the Supreme Court of the United States, Petitioners name the parties to the litigation: M. P. Doran, James A. Scott and James H. Bailey petitioners, v. F. H. Houle and James W. Glosser, respondents.

TABLE OF CONTENTS

	Pages
Questions Presented for Review	i
Parties to This Litigation	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Argument:	
I. Reasons for Granting the Writ	8
A. The Decision of the Court of Appeals Conflicts with *Yick Wo v. Hopkins*, that Unbridled Discretion directed Exclusively against Particular Persons where there is no Mandatory Authority is Discriminatory and a Practical Denial of Due Process	8
B. The Ninth Circuit has altered the Rules for Review of Facts below Contrary to Rule 52 F.R.Civ.P. and an applicable Decision of this Court	10
C. The Decision of the Court of Appeals Conflicts with Decisions of the Fourth and D.C. Circuit Courts of Appeals prohibiting Termination of a Business Interest without Due process	11
Conclusion	15

TABLE OF CONTENTS—Continued

Pages

Appendix "A" Ninth Circuit Court of Appeals Opinion November 18, 1983 ——— App. 1

Appendix "B" District Court's Opinion on Motion for Summary Judgment ——— App. 12

Appendix "C" Judgment of the Circuit Court November 18, 1983 ——— App. 27

TABLE OF AUTHORITIES

Cases

Altop v. The City of Billings, 79 Mont. 25, 255 P. 11 (1927) ——— 9

Cella v. U.S., 208 F.2d 783 (1953) ——— 9

City of Santa Clara, California v. Andrus, 572 F. 2d 660 ——— 12

Continental Ore Company v. Union Carbide Corporation, 370 U.S. 690, 8 L.Ed.2d 777, 82 S.Ct. 1404 (1962) ——— 11

Crosby Transfer and Storage Corporation v. Froehlke, 480 F.2d 498 (1973) ——— 12, 14

Doran v. Houle, 516 F.Sup. 1231 (1981) ——— 1, 3, 5, 7, 8, 10

Fluor Corporation v. United States ex. rel. Mosher Steel Company, 405 F.2d 823, 89 S.Ct. 1632, 23 L.Ed.2d 40 (1969) ——— 11

Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) ——— 12

Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L. Ed.2d 397 (1978) ——— 8

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 3 (1970) ——— 10

TABLE OF AUTHORITIES—Continued

Pages

Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292 (1937) ____ 10

Patterson v. State Department of Revenue, 171 Mont. 168, 557 P.2d 798 (1976) ____ 9

Shillingford v. Holmes, 634 Fed. 2d 263 (5th Cir. 1981) ____ 10, 11

State v. Gleason, 128 Mont. 485, 277 P.2d 530 (1954) ____ 9

Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (1949) ____ 14

United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948) ____ 11

Yick Wo v. Hopkins, 118 U.S. 365 (1886) ____ 8

Constitutional Amendments

Fifth Amendment to the United States Constitution ____ 2

Fourteenth Amendment to the United States Constitution ____ 2, 9

Federal Statutes

5 U.S.C. § 1002(a)(b) ____ 13
28 U.S.C. § 1254(1) ____ 2
42 U.S.C. § 1983 ____ 2, 3

Montana Statutes

82-4203(b) R.C.M. 1947 ____ 9

Law Journals

Terrell, Property and Due Process, 70 Georgetown Law Journal, 861, 903 (1982) ____ 10

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OPINIONS BELOW

The opinion of the Court of Appeals in *Doran v. Houle,* Opinion filed November 18, 1983, appears as Appendix "A". The District Court's opinion on Motion for Summary Judgment, *Doran v. Houle,* 516 F.Supp. 1231 (D. Mont. 1981) is attached as Appendix "B". The judgment of the Circuit Court entered November 18, 1983 is attached as Appendix "C".

JURISDICTION

Petitioners, Doran, Scott and Bailey respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding November 18, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution which in pertinent part provides: "No person shall be . . . deprived of life, liberty or property, without due process of law."

2. The Fourteenth Amendment to the United States Constitution which in pertinent part provides: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

3. 42 U.S.C. 1983 which provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within thee jurisdiction thereof to the deprivation of any rights, privileges, or immuntities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Doran, Scott and Bailey, plaintiffs, sued defendants, Houle and Glosser under 42 U.S.C. 1983 charging them with conspiracy and wrongful deprivation of civil rights (liberty and property) in the removal of permits to use the bruscellosis card test kit without notice or hearing. Prior to trial the District Court found, on Motion for Summary Judgment, that there was no liberty interest, but that there was a property interest in the permit. *Doran v. Houle,* 516 F.Supp. 1231 (Dist. Ct. Mont. 1981) After trial by jury awarding plaintiffs $242,000 in compensatory damages and $30,000 in punitive damages, Houle and Glosser appealed from the judgment and the court's denial of Motions for Judgment NOV. Doran, Scott and Bailey cross appealed from the court's refusal to award attorney's fees and a stay of execution without supersedeas bond pending appeal. The Ninth Circuit Court of Appeals reversed the District Court's decision on the basis that the plaintiffs had no constitutionally protected interest in the permits.

Dr. Doran had a substantial investment in the practice of veterinary medicine in the livestock yard practice in Great Falls, Montana from 1962 when he purchased the Great Falls Auction Market practice and equipment from the veterinarian who controlled the practice. Thereafter, Dr. Doran further invested in the development of the Western Livestock Market by furnishing the equipment for blood tests. Dr. Scott and Dr. Bailey joined Dr. Doran as employees in his practice in 1976.

In 1970 the use of the bruscellosis card test kit became the recognized method of testing animals for bru-

scellosis. Bruscellosis is a highly contagious and infectious bacterial disease occurring primarily in cattle causing reproductive failure and the abortion of calves. Bruscellosis can also cause undulant fever and other ill effects in humans.

The bruscellosis card test kit was used in a joint state and federal program to eradicate bruscellosis. The USDA made the kit available to individuals in the state through a permit issued jointly by state and federal officials. The permit made the kits available to the permit holder from the USDA. In Great Falls, Montana the program was implemented in the Great Falls Auction Market and the Western Livestock Auction Market through administration of the test by Drs. Doran, Scott and Bailey. The government supplied the kits and the veterinarians performed the tests on all cattle that came through the yard. When the test revealed a diseased or suspected diseased animal the animal was destroyed. Without a negative result from the test an animal cannot be shipped in interstate commerce. The test became the key to the veterinary practice in the yards because, although they could perform other services such as pregnancy tests and vaccinations, veterinarians unable to perform the test could not authorize the transfer of cattle through an auction market and therefore the buyer or seller would be required to seek authorization from another veterinarian.

The District Court found:

> "Prior to November 1977 Plaintiffs were authorized by state and federal officials to perform the bruscellosis card test. (Even though plaintiffs' card test permits expired by their own terms one year after they were issued [in this case January through March of 1976] and prior to the November 1977 inci-

dent, state and federal officials continued to provide the card test kits and otherwise treat plaintiffs as if their permits had not expired. There is no real dispute to this, and accordingly the court will view the permits as being renewed.) On November 28, 1977 defendant, Glosser, the state official, without notice or hearing suspended plaintiffs' authority to perform card tests and had the card test kit impounded. (Although not substantiated in the record, the reason for Glosser's decision centered around a rumor that plaintiffs may have released cattle for interstate movement suspected of being infected with bruscellosis.) By suspending plaintiffs' authority to administer the card tests, plaintiffs were put in the same position as other accredited state deputy veterinarians except that they no longer could perform these rapid screening tests. Thus, although plaintiffs could still continue their private practice in livestock markets, plaintiffs contend that the removal of the permit in effect destroyed their livestock yard practice because they could no longer rapidly screen for bruscellosis.

"It wasn't until May of 1978 that plaintiffs were afforded a hearing with the Montana Department of Livestock to contest the charges and revocation. As a result of the hearing, the Board of Livestock voted to reinstate plaintiffs' card test authority and directed defendant Glosser to sign the permits. Defendant Glosser signed the permits, but when the permits were presented to the federal official, Mr. Houle, he refused to co-sign the permits. Plaintiffs continue to be deprived of their permits.

"Defendants are unable to point to any laws or regulations governing the issuance or revocation of the permits. The only authority comes from a "Memorandum of Understanding" between the Montana Department of Livestock and the Veterinary Services USDA, dated August 7, 1973. The memorandum, while authorizing the use of the kits, does not set forth any procedures for the issuance or revocation of the card test permit."

Doran v. Houle, 516 F.Supp. at page 1233.

Accordingly, the District Court held that the relationship between the state and Doran, Scott and Bailey, veterinarians who had administered the card test for the state created a specialized veterinary practice and a business which is dependent upon the continued use of the test.

> "The question here is whether the plaintiffs had an expectation of entitlement for the continued use of these permits sufficient to create a property interest. Neither side can point to specific statutes or regulations dealing with the issuance or revocation of card test permits. There exists only a "Memorandum of Understanding" between the federal and state officials which authorizes the state to jointly issue these card test permits to qualifying state deputy veterinarians such as plaintiffs.
>
> "Except perhaps for emergency health situations, defendants are unable to point to convincing authority which unmistakenly commits the decision to revoke these permits to the unbridled discretion of these officials. While it may be true that the ownership of the test kits rests solely with the federal government, nothing here indicates that Congress or the state intended to give defendants discretion so broad that there is no law to apply and that plaintiffs only safeguard to the removal of these permits would be the good nature of these officials. See, *Pence v. Kleppe*, 529 F.2d at 140, (9th Cir. 1976); compare *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). It appears that the state deputy veterinarians who have held card test permits for several years past rely on their continued right to use their tests in stockyard practice at least as much as Alaska natives rely on their continued use of land, see *Pence v. Kleppe*, 529 F.2d 135, 140-41 (9th Cir. 1976), or as tenants of a HUD project rely on continued low income housing, see *Geneva Tower Ten-*

ants Org. v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974), or as welfare recipients rely on continued welfare benefits, see *Goldberg v. Kelly*, 397 U.S. 254 (1970), or as qualifying unemployed individuals rely upon unemployment, see, *Sherbert v. Verner*, 374 U.S. 398 (1963). *The court helds that a protectable property interest is created where the government issues permits which have the effect of creating a specialized veterinary practice.*

The government cannot on the one hand create a business which is dependent upon a permit and then with the other destroy it by revoking the authorizing permits without first affording sufficient due process. See, *Standard Airlines, Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (D.C. 1949); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. 1964)." *Doran v. Houle*, 516 F.Supp. at 1234-35 (Emphasis Added.)

The Ninth Circuit argument did not address the District Court's findings but instead found it was not bound by them and therefore it conducted an independent review of the plaintiff's claim. *Doran v. Houle*, opinion, page 5, lines 6-15.

The appeals court decision is not based upon a reversal of the District Court's determination of a specialized veterinary practice but instead focuses on the government's unrestricted discretion over the kits and further on the Appeals Court's failure to see any direct evidence of a mutually explicit understanding. *Doran* opinion, page 10, lines 11-17.

ARGUMENT

I. Reasons For Granting the Writ

A. The Decision of the Court of Appeals Conflicts with Yick Wo v. Hopkins, that Unbridled Discretion directed Exclusively against Particular Persons where there is no Mandatory Authority is Discriminatory and a Practical Denial of Due Process.

There is no law compelling a person to have a permit before he may perform the card test nor any law giving unrestricted discretion over all matters involving card test permits. It is therefore apparent there is no law giving either the state or the federal government discretionary authority to revoke its use or unrestricted discretion over future enjoyment of the interest. To allow the Ninth Circuit Opinion to stand will seriously erode the principles set down in the landmark case of *Yick Wo v. Hopkins*, 118 U.S. 365 (1886).

Doran, Scott and Bailey were unique in that all other permit holders in the eradication program were employed by the state and worked exclusively at auction markets. *Doran*, opinion, page 3, lines 22-24. Doran, Scott and Bailey performed the same services as those employees in the eradication program, but received no compensation from the state for administering the tests. As private practitioners they earned their living by serving clients who required their ability to perform the test to ship cattle in interstate commerce. Their right to continue their means of living is fundamental. *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978).

Unfettered discretion directed so exclusively against particular persons warrants and requires the conclusion that, whatever the authority, it is applied with a mind so unequal and oppressive as to amount to a practical denial of due process and equal protection.

> "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any country where freedom prevails as being the essence of slavery itself." *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886).

See also *Altop v. The City of Billings,* 79 Mont. 25, 255 P. 11 (1927) where the Montana Supreme Court recognizes the rule that an ordinance which vests unbridled discretion and arbitrary power in public officials is invalid; *State v. Gleason,* 128 Mont. 485, 277 P.2d 530 (1954) where the state requiring photographers to be licensed gave the licensing board unlimited authority in choosing who was qualified and held to be therefore, authority which is arbitrary and capricious and without constitutional logic in violation of the Montana Constitution and the Fourteenth Amendment.

Every agency in the State of Montana is required to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures. 82-4203(b) R.C.M. 1947. Failure to do so makes the act invalid. *Patterson v. State Dept. of Rev.,* 171 Mont. 168, 557 P.2d 798 (1976).

In the instant case the revocation is without authority but allegedly necessary to the convenience of the administration. Administrative convenience or even necessity cannot override the constitutional requirements of due process. *Cella v. U.S.,* 208 F.2d 783, 798 (7th Cir.

1953); Accord *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 304 (1937).

In the issuance and control over the permits, the government has a monopoly. There is no alternative to processing the change of ownership of cattle in the livestock market. Due process is "to balance the power of government over the individual's life." See Terrell, Property and Due Process, 70 Georgetown Law Journal, 861, 903 (1982).

If permitted to stand, this case will permit unbridled discretion of administrators without any authority. This cannot be the basis of a government of laws not of men.

B. The Ninth Circuit has altered the Rules for Review of Facts below Contrary to Rule 52 F.R.Civ.P. and an applicable decision of this Court.

The Court of Appeals, relying on *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 3 (1970) and *Shillingford v. Holmes*, 634 Fed.2d 263, 265-66 (5th Cir. 1981) declared it was not bound by the District Court's prior determination and conducted an independent review of plaintiffs' claim. *Doran*, opinion, page 5, lines 6-15.

In so doing the Court of Appeals ignored the District Court's findings that the use of the kit by the government in a program to eradicate bruscellosis created a specialized practice of veterinary medicine and thus the plaintiffs' yard practice was dependent upon the permit. The facts found by the trial court are subject to appraisal by the Appeals Court only under the clearly erroneous rule, Federal Rules of Civil Procedure, Rule

52. *United States v. United States Gypsum Co.*, (1948) 333 U.S. 364, 394-95, 68 S. Ct. 525, 92 L.Ed. 746; *Fluor Corp. v. United States ex. rel Mosher Steel Co.*, (CA 9th, 1969) 405 F.2d 823, cert. denied (1969) — U.S. —, 89 S. Ct. 1632, 23 L.Ed. 2d 40. These findings of the District Court must be viewed in their strongest light in favor of those opposing and must be given the advantage of every fair and reasonable intendment. *Continental Ore Company v. Union Carbide Corporation*, 370 U.S. 690 (1962) 8 L.Ed.2d 777, 82 S.Ct. 1404.

While the Court of Appeals may conduct an independent review of the legal conclusions drawn from those facts, it must accept the facts found by the trial court unless clearly erroneous. *Shillingford, supra*, at page 265. If the Doran decision stands it will become precedent in the Ninth Circuit to further ignore the standard for review of facts on appeal.

C. The Decision of the Court of Appeals Conflicts with Decisions of the Fourth and D.C. Circuit Courts of Appeals Prohibiting termination of a business interest without due process.

The valid business property interest arises from an understanding between the parties as shown by the duration of the permit, the historical conduct of the parties under the permit and the reliance by the government on the private practice of veterinary medicine to implement the bruscellosis eradication program as well as on the imposition of the permit on an already established livestock yard practice. Due process is required as a matter of state and federal law.

The Ninth Circuit recognized the principle that an agency cannot terminate a business interest without affording due process. *City of Santa Clara, California v. Andrus*, 572 F.2d 660 at page 675, citing *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964) and *Crosby Transfer and Storage Corporation v. Froehlke*, 480 F.2d 498 (4th, 1973).

Gonzalez, supra, arises out of the debarring of contractors from doing business with the Commodity Credit Corporation. The District of Columbia Circuit Court refused to permit termination of the contractor's right to do business with the Commodity Credit Corporation without notice and an opportunity to be heard in the following language:

> "Congress has made no explicit provision for debarring contractors doing business with Commodity Credit. The question presented is whether commodity Credit is powerless to terminate business relations with irresponsible defaulting or dishonest contractors. Notwithstanding its severe impact upon a contractor, debarment is not intended to punish but is a necessary 'means for accomplishing the congressional purpose' of Commodity Credit to 'aid in the development of foreign markets for, agricultural commodities.' 62 Stat. 1072 (1948), 15 U.S.C. §714c(f) (1958). Without such power to deal with irresponsible bidders and contractors, the efficiency of Commodity Credit's operations would be severely impaired. See *L. P. Stewart & Bro., Inc. v. Bowles*, 322 U.S. 398, 406, 64 S.Ct. 1097, 88 L.Ed. 1350 (1944). We conclude that such a power is inherent and necessarily incidental to the effective administration of the statutory scheme. *Cf. Commodity Credit Corp. v. Worthington*, 263 F.2d 178 (4th Cir.) *cert. denied*, 359 U.S. 1012, 79 S.Ct. 1148, 3 L.Ed.2d 1036 (1959). ***But to the debarment power there attaches an obligation to deal with***

uniform minimum fairness as to all. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)." (Emphasis added) *Gonzalez, supra,* at page 576-577.

Thereafter the D.C. Circuit found that no regulations had been established by Appellees authorizing or governing debarment for misuse of official inspection certificates relating to the commodities exported by Appellants. After citing in full 5 U.S.C. 1002(a)(b) the court made the following statement:

"The command of the Administrative Procedure Act is not a mere formality. Those who are called upon by the government for a countless variety of goods and services are entitled to have notice of the standards and procedures which regulate these relationships. Neither appellants nor others similarly situated can turn to any official source for guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met or refuted, and what consequences will flow from misconduct if found. In the contractual relationship shown by this record an experienced businessman could reasonably anticipate that some agency action might well be taken as a result of misuse of inspection certificates, but he could only speculate as to the nature of the action and the processes by which it would be effected. This condition does not accord with the provisions of the Administrative Procedure Act. On this record there is neither the appearance nor the reality of fairness in the process by which debarment of appellants was accomplished. Disqualification from bidding or contracting for five years directs the power and prestige of government at a particular person and, as we have shown, may have a serious economic impact on that person. Such debarment cannot be left to administrative improvisation on a case-by-case basis. *The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic*

> *fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.*" (Emphasis added) *Gonzalez, supra,* at page 578.

In *Crosby, supra,* the Fourth Circuit enjoined the Secretary of the Army from enforcing a "four carrier" regulation which prevented Crosby from representing more than four carriers. In doing so the court interpreted the agency's regulation in accordance with the agency's administrative practice in applying the same. *Crosby, supra,* pages 501-502. The court found no rules of procedure governing the debarment of Crosby from future government contracts and held: "The Service's failure to state and publish its procedures justified the district court's conditional injunctive relief." *Crosby, supra,* page 503.

There are no cases which are four square with the instant case. However, the parallels of the following case are obvious.

In *Standard Airlines, Inc. v. Civil Aeronautics Board,* 177 F.2d 18 (D.C. 1949) the court considered the suspension of the air carrier's registration without a hearing. There was no statute or law requiring a hearing prior to suspension. After finding that the airline had a substantial investment in equipment and business essential to commercial transportation, the court found that suspension for any considerable time would damage the carrier's business and stated:

> "So the problem before us concerns the statutory and constitutional rights of one who has a substantial

property investment acquired in dependence upon a Government permit which is subject to immediate suspension at any time. What are the requirements of the statute and of due process of law in such a situation?

"The controlling practicality, in our view, is that the suspension would destroy property, not a license property but investment and business property. The Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit. That principle applies to mail privileges. An administrative agency cannot make an otherwise invalid proviso a condition to the grant of a permit. We think the same principles apply here." *Standard Airlines, supra,* at page 20.

The already established business of veterinary medicine in the livestock yard depended upon the permit. The Ninth Circuit's decision permits destruction of the property interest in the livestock yard veterinary practice (investment and business property) without statutory authority. To allow the circuit court's decision to stand would leave the circuits in conflict and create substantial uncertainty in business relationships with the government.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted this 3rd day of February, 1984.

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. CA 82-3445
82-3457
82-3465

D.C. NO. CV-79-14-GF

M. P. DORAN, JAMES A. SCOTT and
JAMES H. BAILEY,

Plaintiffs-Appellees,
Cross-Appellants,

vs.

F. H. HOULE and JAMES W. GLOSSER,

Defendants-Appellants,
Cross-Appellees.

On Appeal from the United States District Court
for the District of Montana

The Honorable Paul Hatfield, District Judge, Presiding
Argued and Submitted June 7, 1983

OPINION

(Filed November 18, 1983)

Before: ANDERSON and FLETCHER, Circuit Judges,
and TAYLOR*, District Judge

TAYLOR, District Judge:

Three Montana veterinarians brought an action under 42 U.S.C. §1983 against two government officials, Dr.

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* The Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

Glosser who was employed by the state of Montana, and Dr. Houle who was employed by the federal government. The complaint alleged a conspiracy to deprive plaintiffs of certain government issued permits without due process of law. The permits in question, which were part of a joint federal-state disease eradication program, allowed the holder to perform a specific test for brucellosis in cattle. Plaintiffs obtained a substantial judgment following a jury trial and defendants appealed. We reverse on the basis that plaintiffs had no constitutionally protected interest in the permits.

OVERVIEW

Brucellosis is a highly contagious and infectious bacterial disease. It occurs primarily in cattle, causing reproductive failure and the abortion of calves. Testimony at trial indicated that, by comparison, brucellosis is presently a greater threat to ranchers than anthrax or hoof-and-mouth disease. Brucellosis can also cause undulant fever and other ill effects in humans.

Montana is particularly vulnerable to this disease as cattle ranching is a major industry in the state. The Department of Livestock is the state agency directly responsible for monitoring and protecting the health of Montana's cattle population.

The federal government, acting through the United States Department of Agriculture (USDA), is also involved in regulating animal welfare. *See* 21 U.S.C. §§111, 114 (1976). One of the steps taken by the federal government to prevent the spread of brucellosis is a requirement that cattle moved interstate be tested and certified as

"brucellosis-free". *See* Department of Agriculture Regulations, 9 CFR, Part 78, subpart B (1983).

There are a number of different tests which can be used to detect the presence of brucellosis in cattle. This case deals with the permits to perform a particular diagnostic test, the "card test". The principal advantage of the card test is its ability to quickly and reliably determine whether a particular animal does not have brucellosis. This makes it particularly suitable for use at auction markets where cattle are assembled and sold prior to interstate shipment.

The card test is performed on a blood sample which can be drawn by any licensed veterinarian. If the test results are negative, the animal is considered to be free of the disease and may be shipped across state lines. If the results are positive, additional tests are required to be certain the animal is not infected. In the interim, the suspect animal is placed in quarantine until followup tests can be completed.

The card test itself is owned by the federal government. The USDA has for many years issued permits to qualified veterinarians. These permit holders have never been allowed to charge cattle owners for performing the test, although as licensed veterinarians they may charge for drawing the necessary blood sample.

In 1973, alerted by a resurgence of brucellosis in Montant, the USDA and the Montana Department of Livestock agreed to cooperate in an aggressive joint-eradication program. The basic parameters of the program were set forth in two government memoranda: a federal Veterin-

ary Services Memorandum and a joint federal-state Memorandum of Understanding.

All three plaintiffs applied for and were issued card test permits in 1976, pursuant to this joint federal-state program. At that time, Drs. Bailey and Scott had recently joined Dr. Doran's practice as salaried associates. Dr. Doran had been practicing veterinary medicine in Great Falls for approximately twenty-five years and had previously held a card test permit. Plaintiffs were unique in that all other permit holders in Montana were employed by the state and worked exclusively at auction markets.

The dispute which culminated in this action began with the discovery in November, 1977, that two cows card tested by plaintiffs and found to be suspect had been released from quarantine prior to a final determination of their health by the Montana State Laboratory. On November 28, 1977, Dr. Glosser, the State Veterinarian for the Department of Livestock, orally notified plaintiffs that their permits were being terminated as a result of their failure to control the two suspect animals and their prior history of permit violations. A letter confirming the termination was mailed two days later.

Plaintiffs, who thought the termination unjustified, made no serious effort to appeal Dr. Glosser's decision until January, 1978, when they attempted to present their case before the Department of Livestock's Board of Directors. The Board Chairman advised plaintiffs they would need to make a formal request for a hearing. Such a request was made, but not until March 6, 1978. The matter was set to be heard in April. At plaintiffs' request, the hearing was subsequently postponed until May.

In the meantime, one of the Board's staff attorneys presented plaintiffs with a three page letter explaining the reasons for Dr. Glosser's termination of their card test authority.

In May, the Board voted to reinstate the three permits. However, because of a subsequent federal investigation into the quarantine breach and changes in Department of Livestock policy regarding re-issuance of card test permits to private veterinarians, plaintiffs were unable to have their permit authority reinstated.

Plaintiffs then filed this action alleging that Dr. Glosser and Dr. Houle, an employee of the USDA, conspired to deprive plaintiffs of their constitutionally protected liberty and property interests without due process of law. Following summary judgment motions, the district court determined, *inter alia*, that a property interest did exist in the card test permits.[1] *Doran v. Houle*, 516 F.Supp. 1231, 1234 (D. Mont. 1981). The case proceeded to trial where a jury awarded plaintiffs compensatory and punitive damages totaling $272,000.

MERITS

The threshold issue in this case is whether a constitutionally protected property interest was implicated. Although the answer to the question of whether a property interest was present necessarily depends on the facts in this case, it remains a legal issue requiring an interpretation of the federal Constitution. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed. 2d 30 (1978). Therefore, we are obligated to conduct an independent review of plaintiffs' claim and are not bound

by the district court's prior determination. *See Shillingford v. Holmes,* 634 F.2d 263, 265-66 (5th Cir. 1981).

The Supreme Court in *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) made it clear that property interests protected by procedural due process are not restricted to a few rigid, technical forms. Rather, the constitutional concept of property embraces a broad, although not infinite, range of interests. *Id.* at 571-72; *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972); *see generally* C. Reich, *The New Property,* 73 Yale L.J. 733 (1964).

To have a property interest in any government benefit, a person must have more than an abstract need or desire for it; he must have a legitimate claim of entitlement. *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709. Plaintiffs contend they have such a legitimate claim, while defendants argue that any expectation of continued entitlement was entirely unilateral.

A legitimate claim of entitlement cannot be premised on the Constitution itself, but must be derived from some independent source in either state or federal law. *Id.* In the immediate case, there were no statutes or regulations establishing administrative standards for issuing or revoking card test permits. *Cf. Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (social security disability benefits). Nor was there an express contract granting a right to continued possession. *Cf. Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840 (1934) (war risk insurance policies).

The absence of a specific statute, regulation or written contract in this case does not necessarily foreclose

the possibility that a property interest might have been created, although the absence of such formal sources is "highly relevant" to the due process question. *Sinderman*, 408 U.S. at 602, 92 S.Ct. at 2699-700. The Supreme Court has declared that a legitimate claim of entitlement can also be based on the conduct and representations of government officials when their actions lead to the creation of a "mutually explicit understanding". *Id.* at 601, 92 S. Ct. at 2699.

The record shows that the card test program in Montana was jointly administered and regulated by the USDA and the Montana Department of Livestock. The permits were issued to qualified veterinarians in accordance with the policies outlined in Veterinary Services Memorandum No. 551.16 and the joint federal-state Memorandum of Understanding. The Veterinary Services Memorandum merely describes basic federal policy concerning use of the card test and offers general guidelines for establishing "[a]n *annual* permit system". [emphasis added]. The joint federal-state memorandum, which outlines the permit system in Montana, is just as cursory. The permits themselves, similarly, do not refer to any specific procedures for obtaining a renewal or challenging a cancellation decision, although each permit includes a specific date of issuance and expiration.

Each of these documents—the federal Veterinary Services Memorandum, the joint federal-state Memorandum of Understanding and the individual permits—included the following statement:

> *Annually, prior to renewal of the permit,* the permit holder may be required to . . . conduct and interpret the card test on standardized check test serums. . . . [emphasis added]

In this case, all three permits had expired at least eight months prior to the time Dr. Glosser terminated plaintiffs' card test authority. On appeal, plaintiffs maintain that because the administering agencies failed to enforce the permit expiration dates the permits should be considered reissued. The facts do not support such a conclusion. Plaintiffs have not cited any testimony or evidence in the record which would indicate the state and federal agencies intended such a result or, by their actions, would have led a reasonable person to conclude that the permits had been renewed. Had plaintiffs applied for renewal but received no response from the government, it might have been possible to find that the permits had been reissued for another year. However, plaintiffs never made such a request; they simply ignored the renewal requirement and continued to perform the federally owned test. Therefore, to the extent plaintiffs retained any authority beyond the permit deadlines, that authority was held at the sufferance and will of the officials charged with administering the permit program in Montana. *See Otten v. San Francisco Hotel Owners Assoc.* 74 Cal.App.2d 341, 168 P.2d 739 (1946) (nonrenewal of expired service contract).

Where the government, as the source of the interest in question, retains unrestricted discretion over future enjoyment of the interest, the interest is not a protected entitlement. *Bishop v. Wood,* 426 U.S. 341, 344-47, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976). Thus, if the permits were held at the will of the governments administering the permit program in Montana, it is axiomatic that plaintiffs can make no legitimate claim to continued possession.

Even if the annual permits had been implicitly reissued in this situation, it is apparent that the joint eradi-

cation program was designed to give the state and federal governments unrestricted discretion over all matters involving card test permits. There were, for example, no published criteria for choosing among qualified applicants or specific standards for determining whether to renew a previously issued permit. *Cf. Roth,* 408 U.S. at 578 (no property interest, where no standards and criteria for reemployment).

Indeed, the very nature of the joint eradication program suggests that the administering agencies were to retain complete discretion in regard to card test permits. The program was created in response to the danger posed by the outbreak of a highly contagious disease which could have a potentially devastating effect on the economy and health of the state. Under these circumstances and without any affirmative statements to the contrary, it is reasonable to conclude that the operation of the program, including control over the card test permits, was left to the discretion of the responsible government officials. The absence of regulations governing permit issuance and cancellation can thus be seen as reflecting the need for flexibility inherent in this type of government program.

There is, finally, no direct evidence to support the existence of a mutually explicit understanding. The arguments offered to advance the existence of such an understanding in this case are not premised on anything the Montana Department of Livestock or USDA did, but on what they failed to do. Plaintiffs do not claim that any agency or official affirmatively represented that existing permit holders would be entitled to retain their authority indefinitely, or even beyond the first year. Instead, plaintiffs rely on arguments describing the governments' lack

of action, including the failure to enforce the permit expiration dates, establish permit renewal procedures and expressly provide that the permits could be removed at the discretion of government officials. Neglecting to enforce the permit expiration dates in this single instance cannot reasonably be said to have created a long-standing practice of ignoring the permit renewal requirement and there certainly is nothing which approaches a "common law" of reissuance in this case. *See Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1099 (9th Cir. 1981); *see also Roth*, 408 U.S. at 578, n. 16. There is, for example, no evidence that the expiration dates of other permits were ignored or that the government agencies in this case were even aware that the plaintiffs' permits had expired. The mere fact a person has received a government benefit in the past, even for a considerable length of time, does not, without more, rise to the level of a legitimate claim of entitlement. *Bollow*, 650 F.2d at 1099.

Similarly, the absence of regulations governing the permit program does not lead to the conclusion that the state and federal governments intended to create a right to continued entitlement. Rather, it tends to support the conclusion that plaintiffs held only a unilateral hope that the agencies would continue to recognize their authority in the future. *See Arena Del Rio, Inc. v. Gonzalez*, 704 F.2d 27 (1st Cir. 1983).

In conclusion, it is evident from the record that plaintiffs' card test authority was held subject to the unrestricted discretion of those government officials administering the joint eradication program. Nothing has been shown which indicates the existence of an agreement contradicting the governments' discretion and securing for

plaintiffs a legitimate expectation of continued entitlement.

After fully reviewing the record in this case, we conclude that the jury's verdict was premised upon an erroneous legal conclusion regarding the scope of protected property under the due process clauses of the fifth and fourteenth amendments to the Constitution. Accordingly, we must vacate and remand the case to the district court with instructions to dismiss plaintiffs' action for failure to state a proper claim for relief under 42 U.S.C. § 1983. This result makes it unnecessary to discuss or decide any of the several additional issues raised by the parties on appeal.

FOOTNOTE

[1]The district court also determined that defendants' actions did not violate plaintiffs' liberty interests. *Doran v. Houle*, 516 F.Supp. at 1235. Plaintiffs, on appeal, indirectly question this finding. We see no error in the district court's decision regarding plaintiffs' alleged liberty interest. *See, Bishop v. Wood*, 426 U.S. 341, 348-49, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976).

APPENDIX "B"

M. P. DORAN, JAMES A. SCOTT, and JAMES H. BAILEY,

Plaintiffs,

v.

F. H. HOULE and JAMES W. GLOSSER,

Defendants.

No. CV-79-14-GF.

United States District Court,
D. Montana,
Great Falls Division.
June 25, 1981.

Veterinarians filed action alleging that the revocation of their permits to perform the brucellosis card test was wrongful. The defendants filed a motion for summary judgment. The District Court, Hatfield, J., held that: (1) the revocation of the veterinarians' permits to perform the brucellosis card test without any notification of specific charges or an opportunity to present evidence in rebuttal improperly terminated an otherwise invalid business property interest; (2) the summary recovation of the permits did not violate the veterinarians' liberty interest, since the assumably false reasons for the revocation were not made public; and (3) the issues of whether the administrator of the Department of Agriculture, Animals and Plant Health Inspection Service was entitled to a defense of qualified immunity and whether various parties conspired to revoke the permits were substantial issues of material fact, precluding summary judgment.

Motion for summary judgment denied in part.

1. *Constitutional Law* 277(1)

Property interest in benefit protected by due process clause results from legitimate claim of entitlement created and defined by independent source, such as state or federal law. U.S.C.A.Const. Amends. 5, 14.

2. *Constitutional Law* 287.2(5)

For purposes of action by veterinarians challenging revocation of permits to perform brucellosis card test, protectible property interest was created when government issued permits which had effect of creating specialized veterinary practice. U.S.C.A. Const. Amends. 5, 14.

3. *Constitutional Law* 287.2(1)

Government cannot on the one hand create a business which is dependent on a permit and then with the other destroy it by revoking the authorizing permits without first affording sufficient due process. U.S.C.A.Const. Amends. 5, 14.

4. *Constitutional Law* 287.2(5)

Revocation of veterinarians' permits to perform brucellosis card test without notice and hearing constituted denial of due process, since veterinarians should have been notified of specific charges and given opportunity to present evidence in rebuttal and receipt of reasons for revocation. U.S.C.A. Const. Amends. 5, 14.

5. *Constitutional Law* 287.2(5)

Summary revocation of veterinarians' permits to perform brucellosis card test did not violate veterinarians'

liberty interest where there was no allegation that state or federal government publicly stated the assumably false reasons for the revocation of card test permit. U.S.C.A. Const. Amends. 5, 14.

6. *Civil Rights* 13.8(1)

Government official is not immune from liability if he knew or reasonably should have known that action he took within his sphere of official responsibility would violate constitutional rights of a plaintiff; qualified immunity is based on reasonable grounds and good-faith belief. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amends. 5, 14.

7. *Civil Rights* 13.13(1)

Burden remains on official claiming immunity for functions performed in his official capacity to demonstrate that his conduct was justified by objectively reasonable belief that it was lawful. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 5, 14.

8. *Federal Civil Procedure* 2491.5

In action by veterinarians challenging revocation of permits to perform brucellosis card test, issue of whether administrator of Department of Agriculture, Animal and Plant Health Inspection Service was entitled to qualified immunity was substantial issue of material fact, precluding summary judgment. Fed.Rules Civ.Proc. Rule 56(c), 28 U.S.C.A.

9. *Federal Civil Procedure* 2491.5

In action by veterinarians challenging revocation of permits to perform brucellosis card test, issue of whether

federal administrators conspired to violate veterinarians' constitutional rights was substantial issue of material fact, precluding summary judgment. Fed.Rules Civ.Proc. Rule 56(c), 28 U.S.C.A.

Gregory O. Morgan, Bozeman, Mont., for plaintiffs.

Robert T. O'Leary, U. S. Atty., C. Richard Anderson, Asst. U. S. Atty., Butte, Mont., for defendant Houle.

Jack L. Lewis, Jardine, Stephenson, Blewett & Weaver, Great Falls, Mont., for defendant Glosser.

MEMORANDUM

HATFIELD, District Judge.

Veterinarians Doran, Scott and Bailey brought suit against F. H. Houle, an administrator of the United States Department of Agriculture, Animal and Plant Health Inspection Service, and against James W. Glosser, an administrator of the Montana Department of Livestock. Plaintiffs brought the action pursuant to 42 U.S.C. § 1983. Jurisdiction is based on 28 U.S.C. § 1343 and § 1331.

Plaintiffs claim that these two administrators together wrongfully revoked permits to perform the brucellosis card test for the brucellosis program testing in Montana. Plaintiffs allege that defendants revoked their permits without notice or a hearing which violated their rights of procedural due process and equal protection. Plaintiffs claim an infringement of a liberty and property interest as set out in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Before the court are defendants' motions for summary judgment pursuant to Rule 56(c), Fed.R.Civ.P. For the

reasons contained herein the motions will be denied in part and granted in part.

FACTS

Drs. Doran, Scott and Bailey had established a veterinary practice in a livestock yard in Great Falls, Montana. All three are licensed veterinarians authorized to practice veterinary medicine as provided by Montana and Federal law. All were deputy state veterinarians for the State of Montana. As part of the practice all three had yearly permits issued by the government for the use of the brucellosis card test kit. As such they may perform various official tuberculosis and brucellosis tests on animals, perform contagious disease control, and write health certificates necessary for interstate shipment of cattle.

Brucellosis is a transmittable infectious bacterial disease found primarily in cattle, the early detection of which is vital to the shipment of cattle from a stockyard. One method for detecting this disease involves the drawing of a blood sample which is then analyzed by the State Laboratory located in Bozeman, Montana. Another method is the brucelloisis card test kit. It is a rapid screening procedure used only in the stockyard market to confirm that an animal does *not* have brucellosis. If the test results are negative an animal may be sold through the market and shipped without the four to five day delay which ensues if the results are sent back from the State Laboratory.

The kits are the exclusive property of the federal government and cannot be used without their express permission.

Prior to November, 1977, plaintiffs were authorized by state and federal officials to perform the brucellosis card test.[1] On November 28, 1977, defendant Glosser, the state official, without notice or hearing suspended plaintiffs' authority to perform card test and had the card test kit impounded.[2] By suspending plaintiffs' authority to administer the card tests, plaintiffs were put in the same position as other accredited state deputy veterinarians except that they no longer could perform these rapid screening tests. Thus, although plaintiffs could still continue their private practice in livestock markets, plaintiffs contend that the removal of the permit in effect destroyed their livestock yard practice because they could no longer rapidly screen for brucellosis.

It wasn't until May of 1978 that plaintiffs were afforded a hearing with the Montana Department of Livestock to contest the charges and revocation. As a result of the hearing the Board of Livestock voted to reinstate plaintiffs' card test authority and directed defendant Glosser to sign the permits. Defendant Glosser signed the permits, but when the permits were presented to the federal official, Mr. Houle, he refused to co-sign the permits. Plaintiffs continue to be deprived of their permits.

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1. Even though plaintiffs' test permits expired by their own terms one year after they were issued (in this case January through March of 1976) and prior to the November, 1977 incident, state and federal officials continued to provide the card test kits and otherwise treat plaintiffs as if their permits had not expired. There was no real dispute as to this, and accordingly the court will view the permits as being renewed.

2. Although not substantiated in the record, the reason for Glosser's decision centered around a rumor that plaintiffs may have released cattle for interstate movement suspected of being infected with brucellosis.

Defendants are unable to point to any laws or regulations governing the issuance or revocation of the permits. The only authority comes from a "memorandum of understanding" between the Montana Department of Livestock and the Veterinary Services, USDA, dated August 7, 1973. The memorandum, while authorizing the use of the kits, does not set forth any procedures for the issuance or revocation of the card test permit.

Plaintiffs assert three bases for recovery. First, that the use of these permits was a government benefit sufficient to create a property interest so as to invoke the constitutional protections of due process. Second, that their reputations were damaged by the revocation which violates a protectable liberty interest. And third, that defendants engaged in an unlawful conspiracy to deprive plaintiffs of their constitutional rights.

Defendants argue that plaintiffs have neither sufficient "property" or "liberty" interest in the continued use of these permits and that therefore summary judgment ought to be granted in favor of them. In addition, defendant Houle argues that he is protected by the qualified immunity doctrine as set forth in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) and *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

Under Rule 56(c), Fed.R.Civ.P., summary judgment is proper only where there is no genuine issue of any material fact, or where "viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law." *Yazzie v. Olney, Levy, Kaplan & Tenner*, 593 F.2d 100, 102 (9th Cir. 1979). An

examination of the facts and legal claims suggests summary judgment is appropriate only to the liberty interest claim.

Plaintiffs' principal claim is that the state and federal government officials denied them due process in the manner in which they revoked their card test permits. There is no dispute that plaintiffs' permits were revoked without notice or hearing. However, in order to invoke the protection of the due process clause plaintiffs, as existing permittees of the card test, must show that they have a sufficient property or liberty interest protected by the due process clause.

PROPERTY INTEREST

The test for identifying a sufficient property interest is not clearly defined. In *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972), the Court stated:

> . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

See also, Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[1] These and other cases make clear that "a property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and defined by an independent source, such as state or federal law." *See Russell v. Landrieu*, 621 F.2d 1037, 1040 (9th Cir. 1980).

[2] The question here is whether plaintiffs had an expectation of entitlement for the continued use of these permits sufficient to create a property interest. Neither side can point to specific statutes or regulations dealing with the issuance or revocation of card test permits. There exists only a "memorandum of understanding" between the federal and state officials which authorizes the State to jointly issue these card test permits to qualifying state deputy veterinarians such as plaintiffs.

Except perhaps for emergency health situations, defendants are unable to point to convincing authority which unmistakenly commits the decision to revoke these permits to the unbridled discretion of these officials. While it may be true that the ownership of the test kits rests solely with the federal government, nothing here indicates the Congress of the State intended to give defendants discretion so broad that there is no law to apply and that plaintiffs' only safeguard to the removal of these permits would be the good nature of these officials. *See, Pence v. Kleppe*, 529 F.2d 135 at 140 (9th Cir. 1976); *cf., Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). It appears that state deputy veterinarians who have held card test permits for several years past rely on their continued right to use the

test in their stockyard practice at least as much as Alaska natives rely on their continued use of land, *see, Pence v. Kleppe,* 529 F.2d 135, 140-141 (9th Cir. 1976), or as tenants of a HUD project rely on continued low-income housing, *see, Geneva Tower Tenants Org. v. Federated Mortgage Investors,* 504 F.2d 483 (9th Cir. 1974), or, as welfare recipients rely on continued welfare benefits, *see, Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), or as qualifying unemployed individuals rely on unemployment compensation, *see, Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The court holds that a protectable property interest is created where the government issues permits which have the effect of creating a specialized veterinary practice.

[3] The government cannot on the one hand create a business which is dependent upon a permit and then with the other destroy it by revoking the authorizing permits without first affording sufficient due process. *See, Standard Airline, Inc. v. Civil Aeronautics Board,* 177 F.2d 18 (D.C. 1949); *Gonzalez v. Freeman,* 334 F.2d 570 (D.C. 1964).

[4] Since it has been determined that due process applies here, the question remains what process is due.[3] *See, Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). While the requirement of

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3. Both parties argue the applicability or inapplicability of both the Montana Administrative Procedures Act, §§ 2-4-101 M.C.A., *et seq.*, and the Federal Administrative Procedures Act, 5 U.S.C. §§ 551, *et seq.* The court need not determine whether the full panoply of procedural rights under these Acts apply here since there is neither the appearance nor the reality of fairness in the process by which defendants revoked plaintiffs' permits.

due process of law depends on several factors such as the interest protected, the risk of loss, and the governmental interest, *see, Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Goldberg v. Kelly,* 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970), the fundamental elements of due process—notice and hearing—were lacking when defendants withdrew the permits and refused to reinstate. Considerations of basic fairness required that plaintiffs be notified of specific charges and an opportunity to present evidence in rebuttal and receipt of the reasons for revocation. In this court's view the suspension of these card test permits in this manner improperly terminated an otherwise valid business property interest.

LIBERTY INTEREST

[5] The court now turns to an examination of whether defendants' summary revocation of the permits violated plaintiffs' liberty interest within the meaning of the Fifth or Fourteenth Amendment. Plaintiffs claim that their reputations were damaged when defendants terminated their right to conduct this type of brucellosis test. Plaintiffs assert the termination is an adverse reflection on their business competence.

As this court recognized in *B.G.M. Enterprises v. Harris,* 482 F.Supp. 1073, 1078 (D.Mont.1980), the "notion of liberty, while imprecise, distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and a charge of incompetence . . . which does not." [citations omitted]

Even if business reputation is protected by a liberty interest, *see, B.G.M. Enterprises, supra,* generally a person's interest in his "good name, reputation, honor or integrity" is not impaired unless the reasons for termination are made public. *See, Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Haimowitz v. University of Nevada,* 579 F.2d 526, 529 (9th Cir. 1978); *Stretten v. Wadsworth Veterans Hospital,* 537 F.2d 361, 365-366 (9th Cir. 1976). Plaintiffs do not allege that the state or federal government publicly stated the assumably false reasons for revocation of the card test permits. Thus, absent public disclosure, there can be no charge that plaintiffs' "standing and associations in the community" were seriously damaged.[4] *Roth, supra,* 408 U.S. at 573, 92 S.Ct. at 2707. Thus, without more plaintiffs are precluded from recovery on this basis and summary judgment shall be entered in favor of defendants on this claim.

QUALIFIED IMMUNITY

Defendants argue that even if there is a protectable property interest which invokes the due process clause, the defense of qualified immunity as explained in *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), and *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) is available. These two cases recognize the doctrine that federal and state executive officials enjoy a qualified immunity for functions performed in

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4. *See, Davis v. Oregon State University,* 591 F.2d 493, 498 (9th Cir. 1978). There the court held that an untenured professor's liberty interest in his good name and reputation was not impaired where reasons for his dismissal were not made public.

their official capacity and which varies according to the scope of discretion, the responsibility of the office and the surrounding circumstances.

[6] In *Scheuer, supra,* the Court stated "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all circumstances, coupled with good-faith belief, that affords the basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S. at 247-248, 94 S.Ct. at 1691-92. A government official is not immune from liability "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights" of a plaintiff. *Wood v. Strickland,* 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); *O'Connor v. Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). In short, qualified immunity is based on reasonable grounds and good-faith belief.

[7] The burden remains with the official claiming immunity to demonstrate "that his conduct was justified by an objectively reasonable belief that it was lawful." *Gomez v. Toledo,* 446 U.S. 635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572 (1980); *see also, Butz v. Economou,* 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978).

[8] The court cannot conclude with certainty based on the affidavits and evidence submitted for this summary judgment motion that defendant Houle is entitled to qualified immunity. Rather, there exists material issues of fact which goes to Houle's scope of discretion, responsibilities, good-faith belief, and the circumstances as they appeared at the time he refused to sign the permits. *See, Morri-*

son v. Jones, 607 F.2d 1269, 1274 (9th Cir. 1979); *cf.*, *Mosher v. Saalfeld*, 589 F.2d 438 (9th Cir. 1978). Thus, summary judgment on this basis is inappropriate.

CONSPIRACY

[9] Plaintiffs also claim that defendants and another federal administrator conspired to violate plaintiffs' constitutional rights. Plaintiffs claim that Glosser, Houle and an agent of the United States Department of Agriculture, Robert Morgan, acted in consort to deprive them of their otherwise entitled permits to conduct brucellosis tests. Plaintiffs basically claim that various conversations took place among these three, the substance of which is, at this time, rather vague.

Although defendants submit affidavits by various officials of the United States Department of Agriculture, including Mr. Morgan, those affidavits raise in the court's view questions of material fact which would best be left for resolution at the trial level. Those questions of fact include various dates affiants communicated with Houle, the reasons for not signing the permits after the Board of Livestock's recommendation to reinstate the same, and the reasons for other card test permits being signed while the federal government was conducting an investigation as to the State's use of these permits. While this court recognizes that more than vague conclusionary allegations are required to state a conspiracy claim, *see, Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), nevertheless the facts upon which plaintiffs rely should be more fully developed at trial.

In sum, the court concludes that under the facts as found by the court, there has been an unconstitutional de-

nial of due process under the Fifth and Fourteenth Amendments by reason of the summary revocation of the plaintiffs' permits. However, the court can find no basis for a liberty interest claim. Therefore, in addition to the conspiracy claim the issue remaining for trial is the qualified immunity defenses.

Accordingly, defendants' motion for summary judgment are therefore denied in part and granted in part. An appropriate order shall issue.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

82-3445
82-3457
82-3465
No._____

DC CV 79-14 PGH

M. P. DORAN, JAMES A. SCOTT, and JAMES H. BAILEY,

Plaintiffs-Appellees,
Cross-Appellants,

vs.

F. H. HOULE and JAMES W. GLOSSER,
Defendants-Appellants,
Cross-Appellees.

JUDGMENT

(Filed December 16, 1983)

APPEAL from the United States District Court for the GREAT FALLS District of MONTANA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the GREAT FALLS District of MONTANA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is vacated and remanded.

Filed and entered November 18, 1983.

Office - Supreme Court, U.S.
FILED
APR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1358

In the Supreme Court of the United States

OCTOBER TERM, 1983

M. P. DORAN, ET AL., PETITIONERS

v.

F. H. HOULE AND JAMES W. GLOSSER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

Cases:	Page
Arnett v. *Kennedy*, 416 U.S. 134	6
Board of Regents v. *Roth*, 408 U.S. 564	4, 7, 8
City of Santa Clara v. *Andrus*, 572 F.2d 660	7
Gonzalez v. *Freeman*, 334 F.2d 570	7
Memphis Light, Gas & Water Division v. *Craft*, 436 U.S. 1	5
Perry v. *Sindermann*, 408 U.S. 593	4, 7, 8
Standard Airlines, Inc. v. *CAB*, 177 F.2d 18	8
W.G. Cosby Transfer & Storage Corp. v. *Froehlke*, 480 F.2d 498	7
Statute and regulation:	
42 U.S.C. (Supp. V) 1983	2
9 C.F.R. Pt. 78, Subpt. B	2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1358

M. P. DORAN, ET AL., PETITIONERS

v.

F. H. HOULE AND JAMES W. GLOSSER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners contend that the refusal to renew their brucellosis card test permits deprived them of their civil rights.

1. Petitioners are three Montana veterinarians who were issued brucellosis card test permits in 1976 under the joint authority of the Montana Department of Livestock and the United States Department of Agriculture (USDA). The permits, which were by their terms valid for one year, had all expired before they were withdrawn in November 1977 by respondent Glosser, the State Veterinarian for the Department of Livestock, because of irregularities in brucel-

losis testing by petitioners.[1] Following a hearing, the State Department of Livestock directed Glosser to reissue the permits, but respondent Houle, the responsible USDA official, refused to renew the permits pending the results of a separate federal investigation. When that investigation was completed, state policy for issuing permits had changed, and petitioners were no longer eligible for them. Petitioners then brought this suit under 42 U.S.C. (Supp. V) 1983 and the Constitution against Houle and Glosser in their personal capacities, claiming that respondents' actions deprived them of property (the permits) without due process of law. Pet. App. 4-5, 17.

Petitioners' permits were issued in connection with a joint federal-state program for the eradication of brucellosis, a serious, highly contagious disease of cattle that can be transmitted to humans in the form of undulant fever (Pet. App. 2). Cattle may not be shipped in interstate commerce unless they have been tested and certified free of brucellosis (9 C.F.R. Pt. 78, Subpt. B). Most brucellosis tests take several days to process in a central state laboratory (creating extra costs and inconvenience for the stockman); in contrast, the brucellosis card test is a rapid screening procedure that can be performed directly in the livestock market. If the test is negative, the cattle can be shipped immediately in interstate commerce. Pet. App. 3. It is therefore essential that the card test be administered properly to ensure accurate results.

The brucellosis card test is the exclusive property of the federal government, and cannot be used without its express permission (Pet. App. 3, 16). Be-

[1] Petitioners were informed of the reasons for the withdrawals (Pet. App. 4).

cause of the serious health and economic implications of misuse, use of the test is strictly controlled. Permits are issued by USDA, generally in conjunction with state livestock agencies, to qualified veterinarians. Permit holders are allowed to use the USDA-owned card test kit free of charge; they cannot charge cattle owners for performing the test, although they may charge for drawing the necessary blood sample (Pet. App. 3). Permit holders in private practice (*i.e.*, those who are not full time state or federal employees) remain free to conduct their usual veterinary practice as they see fit, and to charge the usual fees for their services.[2]

At the time relevant to this lawsuit, the brucellosis card test program in Montana was jointly administered by state and federal authorities pursuant to USDA Veterinary Services Memorandum 551.16 and a joint federal-state Memorandum of Understanding. These documents constituted the sole source of authority and procedures governing card test permits (Pet. App. 20). They provided for the issuance of annual permits to qualified applicants, but established no specific procedures for renewal or cancellation of expired permits.[3] The permits issued to petitioners contained specific dates of issuance and expiration, but were similarly silent as to renewal or cancellation (*ibid.*). Petitioners contended that be-

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[2] Petitioners were the only permit holders in private practice in Montana; most card tests were done by state employees (Pet. App. 4).

[3] Veterinary Services Memorandum 551.16 did, however, provide that "[p]ermits may be cancelled without prior notice if the permit holder uses the card test contrary to the conditions of the permit" (Excerpt of Record (Houle) 71-72).

cause the federal and state issuing authorities had taken no action to enforce the expiration dates of their permits, and had continued to supply them with the materials for making the tests, they were entitled to rely on the continuation of this practice. They also claimed that they had built a specialized veterinary practice based on their ability to offer the card test service. The district court accepted these arguments, and ruled that petitioners had stated a claim for deprivation of a protected property interest (Pet. App. 20-21). The court therefore allowed the case to go to the jury, which returned a verdict of $272,000 against the respondents (Pet. App. 5).

The court of appeals reversed.[4] Relying on *Board of Regents* v. *Roth*, 408 U.S. 564, 577-578 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972), the court held that petitioners had failed to establish the existence of an entitlement sufficient to create a protected property interest in the permits (Pet. App. 5-11). The court found no explicit or implicit limitations on the government's discretion to refuse to renew expired card test permits. The court held that the government's failure to enforce the expiration dates of petitioners' permits (or to establish specific procedures for their withdrawal) could not reasonably be interpreted as manifesting a "mutually explicit understanding[]" (*Perry* v. *Sindermann*, 408 U.S. at 601) between petitioners and the government that the permits would continue in effect indefinitely, particularly in light of the critical nature of the brucellosis eradication program and the strict controls

[4] The opinion of the court of appeals reprinted at Pet. App. 1-11 was amended on rehearing. The amended opinion (721 F.2d 1182; App., *infra*, 1a-11a) contains slight changes in the first and last paragraphs.

placed on the use of the card test (Pet. App. 9-10). Therefore, the court held, petitioners' claim to the permits was based only on a unilateral hope, and did not amount to a constitutionally protected interest.[5]

2. Petitioners' only contention appears to be that the court of appeals improperly overlooked the district court's conclusion (Pet. App. 20-21) that the permits "creat[ed] a specialized veterinary practice" that depended on the permits (Pet. 10). On that basis, petitioners contend that the district court properly concluded that the withdrawal of the permits deprived the petitioners of a property interest in the means of earning their livelihood, triggering certain due process requirements. They assert (Pet. 10-11) that these are factual findings that cannot be overturned unless clearly erroneous.[6] It is well established, however, that the existence vel non of a constitutionally protected property interest is a question of law that is freely reviewable. Cf. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). In any event, in ruling that petitioners failed to show any objective basis for their claim of entitlement to the permits, the court of appeals necessarily rejected the district court's contrary holding. And, obviously, no due process requirements are implicated unless petitioners first demonstrate the existence of a pro-

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[5] The court of appeals accordingly found it unnecessary to reach the other grounds urged for reversal, including the contention that there was, in any event, no denial of due process in the procedures followed, and the claim of a qualified official immunity (Pet. App. 11).

[6] Under petitioners' theory, these findings presumably should have been made by the jury, rather than the court.

tected property interest. *Arnett* v. *Kennedy*, 416 U.S. 134, 164 (1974).[7]

The court of appeals was clearly correct. Even if the property interest question were considered to be partly factual, nothing in the record supports the district court's purported finding that the government was somehow constitutionally responsible for the character of petitioners' practice. Contrary to petitioners' assertion (Pet. 11), the permits were not "impos[ed]" on their livestock yard practice; petitioners received the permits at their request and were under no obligation to use them. Moreover, they remained completely free to conduct their usual veterinary practice as they saw fit; they were not required to make any investment or forego any income-producing activity as a condition of receiving the permits or using the card test. Nor, contrary to petitioners' assertion (Pet. 11), did the government "rel[y] * * * on the private practice of veterinary medicine to implement the bruscellosis [*sic*] eradication program * * *". Petitioners were the only private practitioners in Montana at the time who held permits to administer the card test (Pet. App. 4). All other brucellosis testing, by card test or otherwise, was done by state and federal employees. Thus, when their permits were withdrawn petitioners were merely placed in the same position as other private veterinarians in Montana. They continued to be able to perform (and charge a fee for) all usual veterinary services for cattle, in or out of the livestock markets, including drawing the necessary blood sam-

[7] The district court determined that petitioners had not shown any denial of a liberty interest (Pet. App. 22-23). The court of appeals agreed (Pet. App. 11), and petitioners do not claim otherwise here.

ples for brucellosis testing. To the extent they had chosen to concentrate their practice around their ability to offer the card test service, that was a matter of their own business discretion; it was in no way required or imposed upon them as a necessary aspect of their participation in the card test program. Thus, while petitioners, in reliance on their expectation that they could continue to operate under their expired annual permits, may themselves have elected to create a veterinary practice that was dependent on their participation in the card test program, they cannot establish any objective source for that reliance of the kind necessary to create a constitutionally protected property interest in the continuing validity of the permits. *Board of Regents* v. *Roth*, *supra*. The Constitution does not insulate individuals from the consequences of their own business decisions.

3. The cases cited by petitioners (Pet. 11-15) to support their claim that a "business property interest" was created by their reliance on the permits are inapposite. Each of those cases involved a question of what process was due where an entitlement to a government benefit was already otherwise established. See *City of Santa Clara* v. *Andrus*, 572 F.2d 660 (9th Cir. 1978) (statute established the rights of certain preferred utility customers to rely on continued preference); *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964) and *W.G. Cosby Transfer & Storage Corp.* v. *Froehlke*, 480 F.2d 498 (4th Cir. 1973) (government contractors with established business relationship with the government could not be debarred without procedural protections).[8] No statute or regulation established petitioners' entitlement to

[8] We note in addition that *Gonzalez* was decided before *Roth* and *Sindermann*.

their permits, however, nor did the issuance of the permits create any business relationship with the government.

Petitioners' reliance on *Standard Airlines, Inc.* v. *CAB*, 177 F.2d 18 (D.C. Cir. 1949) is equally erroneous. That case, decided before *Roth* and *Sindermann*, involved an air carrier business that could not exist without government registration. By regulation, the registration could not be revoked without a hearing. Thus the very business itself was a creature of the registration, and the provision of procedural restrictions for revocation objectively entitled the carrier to rely on its registration. The only question before the court was whether the carrier's registration could be *suspended* without a hearing, and in light of the regulatory scheme, the court determined that it could not. As we have shown, however, petitioners clearly could conduct their veterinary practice without card test permits, and no statute, regulation or procedural restrictions provided any objective basis for their claim to continued entitlement.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 82-3445, 82-3457 and 82-3465

M. P. DORAN, JAMES A. SCOTT and JAMES H. BAILEY, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

v.

F. H. HOULE and JAMES W. GLOSSER, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Argued and Submitted June 7, 1983

Decided Nov. 18, 1983

As Amended on Grant of Rehearing
Dec. 19, 1983

On Appeal from the United States District Court
for the District of Montana

Before ANDERSON and FLETCHER, Circuit Judges, and TAYLOR*, District Judge.

FRED M. TAYLOR, District Judge:

Three Montana veterinarians brought an action under 42 U.S.C. § 1983 and the Constitution against two government officials, Dr. Glosser who was employed by the state of Montana, and Dr. Houle who was employed by the federal government. The complaint alleged a conspiracy to deprive plaintiffs of

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* The Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

certain government issued permits without due process of law. The permits in question, which were part of a joint federal-state disease eradication program, allowed the holder to perform a specific test for brucellosis in cattle. Plaintiffs obtained a substantial judgment following a jury trial and defendants appealed. We reverse on the basis that plaintiffs had no constitutionally protected interest in the permits.

OVERVIEW

Brucellosis is a highly contagious and infectious bacterial disease. It occurs primarily in cattle, causing reproductive failure and the abortion of calves. Testimony at trial indicated that, by comparison, brucellosis is presently a greater threat to ranchers than anthrax or hoof-and-mouth disease. Brucellosis can also cause undulant fever and other ill effects in humans.

Montana is particularly vulnerable to this disease as cattle ranching is a major industry in the state. The Department of Livestock is the state agency directly responsible for monitoring and protecting the health of Montana's cattle population.

The federal government, acting through the United States Department of Agriculture (USDA), is also involved in regulating animal welfare. See 21 U.S.C. §§ 111, 114 (1976). One of the steps taken by the federal government to prevent the spread of brucellosis is a requirement that cattle moved interstate be tested and certified as "brucellosis-free". *See* Department of Agriculture Regulations, 9 CFR, Part 78, subpart B (1983).

There are a number of different tests which can be used to detect the presence of brucellosis in cattle. This case deals with the permits to perform a par-

ticular diagnostic test, the "card test". The principal advantage of the card test is its ability to quickly and reliably determine whether a particular animal does not have brucellosis. This makes it particularly suitable for use at auction markets where cattle are assembled and sold prior to interstate shipment.

The card test is performed on a blood sample which can be drawn by any licensed veterinarian. If the test results are negative, the animal is considered to be free of the disease and may be shipped across state lines. If the results are positive, additional tests are required to be certain the animal is not infected. In the interim, the suspect animal is placed in quarantine until follow-up tests can be completed.

The card test itself is owned by the federal government. The USDA has for many years issued permits to qualified veterinarians. These permit holders have never been allowed to charge cattle owners for performing the test, although as licensed veterinarians they may charge for drawing the necessary blood sample.

In 1973, alerted by a resurgence of brucellosis in Montana, the USDA and the Montana Department of Livestock agreed to cooperate in an aggressive joint-eradication program. The basic parameters of the program were set forth in two government memoranda: a federal Veterinary Services Memorandum and a joint federal-state Memorandum of Understanding.

All three plaintiffs applied for and were issued card test permits in 1976, pursuant to this joint federal-state program. At that time, Drs. Bailey and Scott had recently joined Dr. Doran's practice as salaried associates. Dr. Doran had been practicing veterinary medicine in Great Falls for approximately

twenty-five years and had previously held a card test permit. Plaintiffs were unique in that all other permit holders in Montana were employed by the state and worked exclusively at auction markets.

The dispute which culminated in this action began with the discovery in November, 1977, that two cows card tested by plaintiffs and found to be suspect had been released from quarantine prior to a final determination of their health by the Montana State Laboratory. On November 28, 1977, Dr. Glosser, the State Veterinarian for the Department of Livestock, orally notified plaintiffs that their permits were being terminated as a result of their failure to control the two suspect animals and their prior history of permit violations. A letter confirming the termination was mailed two days later.

Plaintiffs, who thought the termination unjustified, made no serious effort to appeal Dr. Glosser's decision until January, 1978, when they attempted to present their case before the Department of Livestock's Board of Directors. The Board Chairman advised plaintiffs they would need to make a formal request for a hearing. Such a request was made, but not until March 6, 1978. The matter was set to be heard in April. At plaintiffs' request, the hearing was subsequently postponed until May. In the meantime, one of the Board's staff attorneys presented plaintiffs with a three page letter explaining the reasons for Dr. Glosser's termination of their card test authority.

In May, the Board voted to reinstate the three permits. However, because of a subsequent federal investigation into the quarantine breach and changes in Department of Livestock policy regarding reissuance of card test permits to private veterinar-

ians, plaintiffs were unable to have their permit authority reinstated.

Plaintiffs then filed this action alleging that Dr. Glosser and Dr. Houle, an employee of the USDA, conspired to deprive plaintiffs of their constitutionally protected liberty and property interests without due process of law. Following summary judgment motions, the district court determined, *inter alia*, that a property interest did exist in the card test permits.[1] *Doran v. Houle*, 516 F. Supp. 1231, 1234 (D. Mont. 1981). The case proceeded to trial where a jury awarded plaintiffs compensatory and punitive damages totaling $272,000.

MERITS

The threshold issue in this case is whether a constitutionally protected property interest was implicated. Although the answer to the question of whether a property interest was present necessarily depends on the facts in this case, it remains a legal issue requiring an interpretation of the federal Constitution. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). Therefore, we are obligated to conduct an independent review of plaintiffs' claim and are not bound by the district court's prior determination. *See Shillingford v. Holmes*, 634 F.2d 263, 265-66 (5th Cir. 1981).

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[1] The district court also determined that defendants' actions did not violate plaintiffs' liberty interests. *Doran v. Houle*, 516 F.Supp. at 1235. Plaintiffs, on appeal, indirectly question this finding. We see no error in the district court's decision regarding plaintiffs' alleged liberty interest. *See, Bishop v. Wood*, 426 U.S. 341, 348-49, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684 (1976).

The Supreme Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) made it clear that property interests protected by procedural due process are not restricted to a few rigid, technical forms. Rather, the constitutional concept of property embraces a broad, although not infinite, range of interests. *Id.* at 571-72, 92 S.Ct. at 2705-06; *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972); *see generally* C. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

To have a property interest in any government benefit, a person must have more than an abstract need or desire for it; he must have a legitimate claim of entitlement. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Plaintiffs contend they have such a legitimate claim, while defendants argue that any expectation of continued entitlement was entirely unilateral.

A legitimate claim of entitlement cannot be premised on the Constitution itself, but must be derived from some independent source in either state or federal law. *Id.* In the immediate case, there were no statutes or regulations establishing administrative standards for issuing or revoking card test permits. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (social security disability benefits). Nor was there an express contract granting a right to continued possession. *Cf. Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) (war risk insurance policies).

The absence of a specific statute, regulation or written contract in this case does not necessarily foreclose the possibility that a property interest might have been created, although the absence of such formal sources is "highly relevant" to the due

process question. *Sindermann*, 408 U.S. at 602, 92 S.Ct. at 2699-700. The Supreme Court has declared that a legitimate claim of entitlement can also be based on the conduct and representations of government officials when their actions lead to the creation of a "mutually explicit understanding". *Id.* at 601, 92 S.Ct. at 2699.

The record shows that the card test program in Montana was jointly administered and regulated by the USDA and the Montana Department of Livestock. The permits were issued to qualified veterinarians in accordance with the policies outlined in Veterinary Services Memorandum No. 551.-16 and the joint federal-state Memorandum of Understanding. The Veterinary Services Memorandum merely describes basic federal policy concerning use of the card test and offers general guidelines for establishing "[a]n *annual* permit system". [emphasis added] The joint federal-state memorandum, which outlines the permit system in Montana, is just as cursory. The permits themselves, similarly, do not refer to any specific procedures for obtaining a renewal or challenging a cancellation decision, although each permit includes a specific date of issuance and expiration.

Each of these documents—the federal Veterinary Services Memorandum, the joint federal-state Memorandum of Understanding and the individual permits—included the following statement:

> *Annually, prior to renewal of the permit*, the permit holder may be required to . . . conduct and interpret the card test on standardized check test serums. . . . [emphasis added]

In this case, all three permits had expired at least eight months prior to the time Dr. Glosser termi-

nated plaintiffs' card test authority. On appeal, plaintiffs maintain that because the administering agencies failed to enforce the permit expiration dates the permits should be considered reissued. The facts do not support such a conclusion. Plaintiffs have not cited any testimony or evidence in the record which would indicate the state and federal agencies intended such a result or, by their actions, would have led a reasonable person to conclude that the permits had been renewed. Had plaintiffs applied for renewal but received no response from the government, it might have been possible to find that the permits had been reissued for another year. However, plaintiffs never made such a request; they simply ignored the renewal requirement and continued to perform the federally owned test. Therefore, to the extent plaintiffs retained any authority beyond the permit deadlines, that authority was held at the sufferance and will of the officials charged with administering the permit program in Montana. *See Otten v. San Francisco Hotel Owners Assoc.*, 74 Cal.App.2d 341, 168 P.2d 739 (1946) (nonrenewal of expired service contract).

Where the government, as the source of the interest in question, retains unrestricted discretion over future enjoyment of the interest, the interest is not a protected entitlement. *Bishop v. Wood*, 426 U.S. 341, 344-47, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976). Thus, if the permits were held at the will of the governments administering the permit program in Montana, it is axiomatic that plaintiffs can make no legitimate claim to continued possession.

Even if the annual permits had been implicitly reissued in this situation, it is apparent that the joint eradication program was designed to give the state

and federal governments unrestricted discretion over all matters involving card test permits. There were, for example, no published criteria for choosing among qualified applicants or specific standards for determining whether to renew a previously issued permit. *Cf. Roth*, 408 U.S. at 578, 92 S.Ct. at 2709 (no property interest, where no standards and criteria for reemployment).

Indeed, the very nature of the joint eradication program suggests that the administering agencies were to retain complete discretion in regard to card test permits. The program was created in response to the danger posed by the outbreak of a highly contagious disease which could have a potentially devastating effect on the economy and health of the state. Under these circumstances and without any affirmative statements to the contrary, it is reasonable to conclude that the operation of the program, including control over the card test permits, was left to the discretion of the responsible government officials. The absence of regulations governing permit issuance and cancellation can thus be seen as reflecting the need for flexibility inherent in this type of government program.

There is, finally, no direct evidence to support the existence of a mutually explicit understanding. The arguments offered to advance the existence of such an understanding in this case are not premised on anything the Montana Department of Livestock or USDA did, but on what they failed to do. Plaintiffs do not claim that any agency or official affirmatively represented that existing permit holders would be entitled to retain their authority indefinitely, or even beyond the first year. Instead, plaintiffs rely on arguments describing the governments' lack of action,

including the failure to enforce the permit expiration dates, establish permit renewal procedures and expressly provide that the permits could be removed at the discretion of government officials. Neglecting to enforce the permit expiration dates in this single instance cannot reasonably be said to have created a long-standing practice of ignoring the permit renewal requirement and there certainly is nothing which approaches a "common law" of reissuance in this case. *See Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1099 (9th Cir. 1981); *see also Roth*, 408 U.S. at 578, n.16, 92 S.Ct. at 2709 n.16. There is, for example, no evidence that the expiration dates of other permits were ignored or that the government agencies in this case were even aware that plaintiffs' permits had expired. The mere fact a person has received a government benefit in the past, even for a considerable length of time, does not, without more, rise to the level of a legitimate claim of entitlement. *Bollow*, 650 F.2d at 1099.

Similarly, the absence of regulations governing the permit program does not lead to the conclusion that the state and federal governments intended to create a right to continued entitlement. Rather, it tends to support the conclusion that plaintiffs held only a unilateral hope that the agencies would continue to recognize their authority in the future. *See Arena Del Rio, Inc. v. Gonzales*, 704 F.2d 27 (1st Cir. 1983).

In conclusion, it is evident from the record that plaintiffs' card test authority was held subject to the unrestricted discretion of those government officials administering the joint eradication program. Nothing has been shown which indicates the existence of an agreement contradicting the governments' discre-

tion and securing for plaintiffs a legitimate expectation of continued entitlement.

After fully reviewing the record in this case, we conclude that the jury's verdict was premised upon an erroneous legal conclusion regarding the scope of protected property under the due process clauses of the fifth and fourteenth amendments to the Constitution. Accordingly, we must vacate and remand the case to the district court with instructions to dismiss plaintiffs' action for failure to state a proper claim for relief under 42 U.S.C. § 1983 or directly under the Constitution. This result makes it unnecessary to discuss or decide any of the several additional issues raised by the parties on appeal.

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Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Under circumstances in which a contract between federal and state agencies authorizes a federally owned and furnished card method of testing for Brucellosis to be exercised only by Deputy State Veterinarians who have been issued annual permits by the State Veterinarian, does a Deputy State Veterinarian, whose private veterinary practice has been enhanced through veterinary work acquired ancillary to his use of the card test, have a constitutionally protected property right to the continued use thereof when (a) the veterinarian holds his deputyship at the will of the State Veterinarian, (b) the Deputy State Veterinarian has allowed his card test permit to expire, and (c) the State Veterinarian, in disciplining the deputy, withdraws his day-to-day, at sufferance authority to use the card test?

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF THE CASE	1
ARGUMENT	
A. The Petitioners Had No Property Right In Continued Usage Of The Card Test Kits	3
B. The "Clearly Erroneous" Requirement Of Rule 52, F. R. Civ. P., Is Not Applicable To Legal Issues Requiring An Interpretation Of The Federal Constitution	5
C. Decisions Of The Courts Of Appeals Are Not In Conflict	5
D. The Subject Question Is Not Worthy Of Certiorari In That It Is Too Unique, Has Little Effect, And A Reversal Would Not Bring About A Different Result	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:

Bonner v. District Court, 122 Mont. 464, 206 P.2d 166 (1949)	4
Garrett v. Mathews, 625 F.2d 658 (5th Cir. 1980)	4
Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964)	5
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	7
Logan v. Zimmerman Brush Co., 455 U.S. 422, (1982)	7
Meinecke v. McFarland, 122 Mont. 515, 206 P.2d 1012 (1949)	4
Nye v. Department of Livestock, — Mont. —, 639 P.2d 498, (1982)	5

TABLE OF AUTHORITIES—(Continued)

	Pages
Otten v. San Francisco Hotel Owners Assoc., 74 Cal. App.2d 341, 168 P.2d 739 (1946)	4
Parratt v. Taylor, 451 U.S. 527 (1981)	7
Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982)	5
Rusch v. Board of County Commissioners, 121 Mont. 162, 191 P.2d 670 (1948)	4
Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981)	5
Standard Airlines Inc. v. Civil Aeronautics Board, 177 F.2d 18 (D.C. 1949)	6
State ex rel. MacGilvra v. Historical Society, 148 Mont. 182, 418 P.2d 874 (1966)	4
W. G. Cosby Transfer and Storage Corporation v. Froehlke, 480 F.2d 498 (4th Cir. 1973)	5

OTHER AUTHORITIES:

42 USC § 1983	3
Rule 52, F. R. Civ. P.	5
Section 2-4-101 MCA, et seq.	4
Section 2-16-213(1) MCA	4
Section 2-16-301 MCA	4

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

The card method of testing for Brucellosis is owned by the United States with the intended beneficiary being cattlemen and the cattle industry, not veterinarians holding card test authority. Accordingly, the card method of testing and card test kits, at the time here involved, could be used by veterinarians only under certain conditions. Two of those conditions were that (1) the veterinarian must have held an appointment from Montana State Vet-

erinarian Glosser as a deputy, and (2) the deputy could administer the card test only if an annual permit had been issued to him by the State Veterinarian. Because the cattle industry was the intended benficiary of the card method of testing, the United States prohibited permit holders from charging for the test itself, although they could charge for drawing the blood sample necessary for performing the test.

The Petitioners were Deputy State Veterinarians who, under Montana law, held their appointments as deputies at the will of the Montana State Veterinarian. The Petitioners had at one time been issued permits by the State Veterinarian, but the permits expired by their terms almost eight months before the occurrence which is the basis of the Petitioners' action. Although the office of the State Veterinarian continued to furnish card test kits to the Petitioners after the expiration of their permits, and the Petitioners continued to use the card tests at the sufferance of the State Veterinarian, the Petitioners did nothing to renew their annual permits.

Two cows suspected of Brucellosis were allowed into interstate commerce in violation of federal law. State Veterinarian Glosser was of the opinion that those violations were allowed to occur as a consequence of improper usage and control of the Brucellosis card tests by the Petitioners. Under state law, State Veterinarian Glosser could have suspended or revoked the appointment of the Petitioners as Deputy State Veterinarians without any cause whatsoever which by itself would have constituted termination of Petitioners' card test authority; however, in State Veterinarian Glosser's consideration, that dis-

ciplinary measure would have been too severe for large animal practitioners. Accordingly, State Veterinarian Glosser disciplined his deputies by sequestering the card test kits in the possession of those deputies and by withdrawing such authority as they had to use the kits.

Even though their card test authority was withdrawn, Petitioners continued to perform all other veterinary services which veterinarians not holding card test authority could perform; they incurred no direct loss of income. Petitioners, for a period of time, continued to draw blood samples for tests and charged for such drawings. The only function in the testing program Petitioners could not perform was the card test itself for which a charge could *not* be made even if they had retained card test authority. The Petitioners brought this action under 42 USC § 1983 which, necessarily, requires a constitutionally protected property right to give rise to a cause of action. The Petitioners' claim was founded upon loss of the enhancements to their private practice acquired through veterinary work which they acknowledge as having been acquired ancillary to their use of the government-owned card test kits.

ARGUMENT

A. The Petitioners Had No Property Right In Continued Usage Of The Card Test Kits.

I.

Upon expiration of their one year permits, the Petitioners at most had but day-to-day card test authority.

Therefore, to the extent Petitioners retained any authority beyond the expiration date of their permits, that authority was held at the sufferance, at the will, or at the pleasure of the officials charged with administering the permit program in Montana. See *Otten v. San Francisco Hotel Owners Assoc.*, 74 Cal.App.2d 341, 168 P.2d 739 (1946) (nonrenewal of expired service contract).

Under the facts of this case, the card test kits could be used only by veterinarians holding appointment as deputies from State Veterinarian Glosser. Under Montana law, deputies hold their appointments as deputies only at the will of the State Veterinarian and can have their deputyship revoked or suspended at any time without cause and without notice or opportunity for hearing. §§ 2-16-301 and 2-16-213(1) MCA. See also *Rusch v. Board of County Commissioners*, 121 Mont. 162, 191 P.2d 670 (1948); *Meinecke v. McFarland*, 122 Mont. 515, 206 P.2d 1012 (1949); *Bonner v. District Court*, 122 Mont. 464, 206 P.2d 166 (1949); and *State ex rel. MacGilvra v. Historical Society*, 148 Mont. 182, 418 P.2d 874 (1966). A superior officer may surely impose a less severe sanction. See *Garrett v. Mathews*, 625 F.2d 658 (5th Cir. 1980).

Under decisions of this Court too well known to require citation of authority, there is no constitutionally protected property interest in an "at will" or an "at pleasure" authorization.

II.

There is nothing under Montana law, including the Montana Administrative Procedure Act, Section 2-4-101

MCA, et seq. (hereinafter "MAPA"), which itself affords the Petitioners the right to a hearing prior to termination of their day-to-day card test authority. It is only if and when some law other than the MAPA requires a hearing that the MAPA provides the framework and guidelines for the hearing required by that other law. *Nye v. Department of Livestock*, — Mont. —, 639 P.2d 498, 501 (1982).

B. The "Clearly Erroneous" Requirement of Rule 52, F. R. Civ. P., Is Not Applicable To Legal Issues Requiring An Interpretation Of The Federal Constitution.

The District Court "findings" were made upon the Respondent's Motion for Summary Judgment which required the District Court merely to resolve whether the law, as applied to established facts, was violated. Such resolutions, as well as conclusions on mixed questions of law and fact, are independently reviewable by an appellate court. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); and *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981).

C. Decisions Of The Courts Of Appeals Are Not In Conflict.

The cases cited by Petitioners, i.e., *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), and *W. G. Cosby Transfer and Storage Corporation v. Froehlke*, 480 F.2d 498 (4th Cir. 1973), are not in conflict with the decision herein of the Ninth Circuit Court of Appeals. The holding in each of those cases was that the government agency there involved could not terminate a *business relationship* existing between the agency and the plaintiff without af-

fording a due process type of hearing; additionally, the intended beneficiary of the "permit" in those cases was the permittee. In the present case, no *business relationship* existed between the Petitioners and State Veterinarian Glosser; on the contrary, the relationship was merely one in which the Petitioners were at-will deputies of the State Veterinarian who, in disciplinary action, withdrew the Petitioners' day-to-day authority as deputies to use government-owned property, the intended beneficiary of which was the livestock industry and not the Petitioners or the veterinary profession.

Nor is the case of *Standard Airlines Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (D.C. 1949), in conflict with the decision herein of the Court of Appeals. *Standard Airlines* revolved around the perceived total destruction of investment and business property, in a business wholly dependent upon a government permit. (*Standard Airlines, supra*, p. 20). These factors are wholly absent in the instant fact situation in that here all that was lost by Petitioners as a result of the withdrawal of their day-to-day authority to perform the card tests was their authority to perform a test for which they could not charge a fee.

D. The Subject Question Is Not Worthy Of Certiorari In That It Is Too Unique, Has Little Effect, And A Reversal Would Not Bring About A Different Result.

As Petitioners acknowledge on page 8 of their Petition, they "were unique in that all other permit holders in the [Brucellosis] eradication program were employed by

the state and worked exclusively at auction markets." This, undoubtedly, is one of the reasons why the Petitioners have found "no cases which are four-square with the instant case" (Petition, p. 14).

Additionally, for all practical purposes, the question is moot in that because of a change in Department of Livestock policy, the card test authority of the Petitioners would have terminated anyway seven months later. Furthermore, Montana soon thereafter became a "Brucellosis free state", and the testing requirements which necessitated the original implementation of the card method of testing were lowered, thereby resulting in the dropping of the card method of testing.

Even if certiorari were granted and the decision of the Circuit Court were reversed because of a determination that the Petitioners did have a property interest, entry of judgment in favor of Respondent Glosser would still result. The reason for this is that the Petitioners were afforded a hearing shortly after their authority was withdrawn, thus complying with due process requirements. *Parratt v. Taylor*, 451 U.S. 527, 539-541 (1981); and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

Finally, as Petitioners have acknowledge, they occupied a unique position and there are no cases "four-square with the instant case." Inasmuch as there was no "clearly established law" which Respondent Glosser could be said to have violated, and since he had qualified immunity as a state official, the case would be dismissed under authority of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated March 30, 1984.